IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPEALLATE SIDE JURISDICTION

APPEAL FROM ORDER NO.660 OF 2001

IN

NOTICE OF MOTION NO.2709 OF 1999

IN

L.C.SUIT NO.3150 OF 1999

The Municipal Corporation of Greater Mumbai. ..Appellant. (Org. Deft.)

Vs.

Smt.Laxmibai Maganlal Oza & one ..Respondents. (Org. Plffs.)

Mr.J.Xavier, Advocate for Appellant.

Ms.Priti Shah, Advocate for Respondent No.2.

Mr.A.C. Singh Advocate i/b. Mr.D.R. Shah for Respondent No.1.

CORAM: V.C.DAGA, J.

DATE: 30TH AUGUST, 2004.

P.C: :-

1. This appeal is directed against the order dated 8th December,2000 passed in Notice of Motion No.2709 of 1999 in L.C.Suit No.3150 of 1999 by the Bombay City Civil Court at Bombay challenging the order

making notice of motion absolute and restraining the defendant Corporation from demolishing any portion of the disputed suit structure till the disposal of Suit No.3150 of 1999.

THE FACTS

2. The facts giving rise to the present appeal in short are as under :-

. That the suit structure possessed by the respondent No.1 was demolished by the Corporation on 5th June, 1996. Thereafter the present respondent challenged the said action of demolition by moving Miscellaneous Application No.117 of 1996 before the Slum Tribunal constituted under the Provisions of the Maharashtra Slum Areas (Improvement, Clearance and Re-development) Act, 2003.

3. The Slum Tribunal by an order was pleased to permit reconstruction of the demolished structure. This order of the Slum Tribunal permitting the reconstruction of the structure was challenged and set

aside on 8th November, 1996 by the learned Single Judge of this Court in Writ Petition No.1211 of 1996 by an order dated 4th August, 1997.

4. Being aggrieved by the aforesaid order the present respondent No.1 had filed L.P.A.No.17 of 1997 before the Division Bench of this Court. The Division Bench after hearing the parties, was pleased to dispose of the said L.P.A. vide its order dated 12th February, 1997 whereby the order of the learned Single Judge was confirmed. Liberty was given to the Corporation to take action under Section 351 of B.M.C. Act with further clarification that it would be open for the noticees to file their reply. The Corporation was directed to consider the same on its own merits and pass appropriate orders in accordance with the law.

5. The present respondent No.1 Corporation after disposal of the L.P.A. issued notice of proposed demolition under Section 351 of the B.M.C. Act on 7th May, 1997. The said notice was replied by the respondent No.1 on 27st May, 1999. The Deputy Commissioner of the Municipal Corporation was pleased to hear the noticees and was further pleased issue notice dated 29th May, 1999 under Section 488 of B.M.C.

Act for demolition of structure in question.

6. Respondent no.1, the original plaintiff chose to file present L.C.Suit No.3150 of 1999 to challenge the action of the Corporation. In the said Suit, Notice of Motion came to be moved seeking to restrain Corporation from demolishing the said structure, which was constructed under the order of Slum Tribunal. The said Notice of Motion came to be allowed. It was made absolute with the result, Corporation has been restrained from demolishing the structure in question. This order is a subject matter of challenge in this appeal from order.

7. Learned Counsel Mr. Xavier appearing for the Corporation submitted that in view of the earlier round of litigation all contentions raised by the respondent no.1 with respect to the legality of the structure has been adjudicated upon by the competent Courts right up to High Court. He further submitted that the contentions raised in the present suit could have been raised in the earlier round of litigation since those contentions were not raised, it will have to be treated that they were in issue and shall be deemed to have been decided against the respondent No.1. That the orders passed by the Competent Courts

in earlier round of litigation will operate as 'constrictive resjudicata'. In his submission, the trial Court was not justified in granting the interim injunction; on the face of the earlier orders of the Court. He further submits that not a single document is on record to show that the structure is standing since 1962 and therefore, in his submissions, the said structure cannot be treated as authorised structure. He further submits that since the structure was demolished and it was reconstructed under the orders of the Slum Tribunal, which has already been set aside by the competent Court, in that view Corporation was well within its powers to direct the demolition thereof.

8. Mr.Singh, learned Counsel for the respondent tried to counter all the submissions made by Mr.Xavier but he could not take his submissions to their logical end. By way of last submission, Mr.Singh submitted that during the pendency of this appeal, Corporation has issued photopass to the present respondent No.1. In view this subsequent development, in his submission, this appeal, at the instance of the Corporation, would not survive. He submits the Corporation itself has recognised the legality of the existence of the structure in question by issuing photopass. That in view of the issuance of the photopass, the appeal needs

to be dismissed.

9. The xerox copy of the said photopass is placed on record on 9th August, 2004. The copy thereof was also served on the Counsel appearing for the appellant i.e. on 10th August, 2004. No counter affidavit has been filed on behalf of the Corporation till date in spite of more than 10 days.

10. The learned Counsel for the Corporation submits that he is unable to say as to under what circumstances the said photopass has been issued. He tried to create doubt about the legality of the photopass without any material in support of his submission.

11. Having considered the rival contentions as on date there is nothing on record to show that the photopass has been obtained by the respondent No.1 either by practicing fraud or on the basis of any misrepresentation. Photopass has to be accepted as legal and valid in absence of any contrary evidence. Official act done in the official capacity has to be presumed as lawfully done. In view of the subsequent conduct of the Corporation with respect to the issuance of the photopass, it is to be presumed that Corporation

has accepted the legality of the structure. In view of the issuance of the photopass, the protection to the structure of the respondent No.1 has to be extended. In the circumstances this appeal is liable to be dismissed.

6. In spite of the dismissal of this appeal, if the Corporation after enquiry comes to the conclusion that the photopass was issued either fraudulently or illegally, in that event it is open to the Corporation to withdraw or cancel the photopass in accordance with law. So long as the photopass exists the structure of the respondent No.1 has to be protected.

7. In the result, appeal is allowed. Notice of Motion is made absolute with no order as to costs.

. Parties to act on the copy of this order duly authenticated by the Associate/C.S.

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